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GHAZALI MAT & ORS v. PENGARAH TANAH DAN GALIAN NEGERI TERENGGANU & ANOR

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
LEE HENG CHEONG JCA
B GHAZALI CHA JCA
[CIVIL APPEAL NO: T-01(NCvC)(W)-588-10-2019]
13 JULY 2022

C **Abstract** – *When a court order has already found the respondents liable and ordered assessment of various heads of damages, there is no longer any need to further probe the issue of liability by another court. A proper assessment ought to be made on the quantum of damages, such as taking into account the evidence of an expert and impartial witness in awarding general damages and considering whether there was* D *oppressiveness or unconstitutional conduct justifying the award of exemplary damages.*

E ***TORT:*** *Damages – Assessment – Quantum of – Claimants ordered to vacate holdings in palm oil plantation scheme – Whether claimants entitled to damages – Whether there was negligence and breach of fiduciary duties – Whether High Court erred in dismissing claimants' claim for damages – Whether High Court acted in excess of jurisdiction by reopening issue of liability – Whether irrelevant considerations taken into account – General damages – Whether ought to be awarded – Whether there was oppressiveness or unconstitutional conduct justifying* F *award of exemplary damages*

The 23 appellants in this appeal were part of 164 young persons selected by the State Government of Terengganu to participate in the group settlement areas scheme under the Land (Group Settlement Areas) Act 1960, developed and managed by the Federal Land Consolidation and Rehabilitation G Authority ('Felcra'). There were two schemes involved *ie*, Felcra Bukit Kapah I Scheme ('FBK-I') and Felcra Bukit Kapah II scheme ('FBK-II'). In 1978 and 1979, the appellants entered the FBK-I scheme to develop the land for the purpose of palm oil plantation. Each participant was given a total holding of ten acres as palm oil planting plot and a half an acre as residential H plot. Each participant was also provided with costs of living which was regarded as loan payable to Felcra and when the palm oil produced revenue, Felcra would deduct part of the income as (i) advanced cost of living; and (ii) consolidated annual charges payable to the State Government of Terengganu *in lieu* of premium paid under the National Land Code ('NLC'). I In 2002, Felcra proposed a replantation for the FBK-I Scheme. In order to do so, the State Executive Council ('Exco') decided to grant the appellants, a site in FBK-II in place of FBK-I. A total of 32 participants, including the

appellants, refused to move out and to participate in the replantation scheme on the grounds that they did not want to be continuously indebted with Felcra. The new State Government of Terengganu, formed after the 2004 election, decided to revoke the Exco's decision for the resettlement to FBK-II scheme. Pursuant to the decision, the appellants were ordered to vacate their holdings in FBK-II scheme. Dissatisfied with the decision, the appellants filed a claim in the High Court. The High Court held that the appellants' claim was without merit and dismissed the same. Hence, the appellants appealed to the Court of Appeal. The Court of Appeal, in allowing the appellants' appeal in part, held, *inter alia* (i) the appellants were entitled to the title under the FBK-I scheme with all costs for survey and the subdivision of lots to be payable in full by the respondents; (ii) the appellants were declared to be entitled to the land titles of ¼ acre each as residential area regardless of whether the land was being or had been occupied by the appellants; and (iii) general damages, special damages as well as aggravated and exemplary damages, if any, to be assessed. Pursuant to this Court of Appeal's order, there was an assessment hearing before the Deputy Registrar of the Terengganu High Court to determine the quantum of damages, if any, that the appellants were entitled to. The Deputy Registrar declined to award the appellants any damages whatsoever. Dissatisfied, the appellants appealed against this decision to the High Court. The High Court dismissed the appellants' appeal. Thus, the appellants filed this appeal before this court against the decision of the High Court in respect of the quantum of damages only. The appellants contended, *inter alia*, (i) that the High Court Judge ('HCJ') had adopted the main error by the Deputy Registrar, in that, his decision to dismiss the appellants' appeal and affirm that they were entitled to no damages whatsoever was primarily predicated on the erroneous finding of contributory negligence on their part; (ii) that the HCJ compounded the error of the Deputy Registrar by further delving into the issue of liability; (iii) that the HCJ, in deciding not to grant damages, acted in excess of jurisdiction and focused on a plainly wrong approach of reopening the issue of liability and that this, in itself, should be sufficient grounds for this appeal to be allowed; and (iv) that the HCJ had taken into account irrelevant considerations in assessing damages.

Held (allowing appeal in part)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The matter of liability had already been settled by the Court of Appeal order. The respondents had been found liable, and there was no finding of contributory negligence on the part of the appellants. Nor was there a finding that if general compensation was awarded, the appellants would be unjustly enriched because the appellants themselves contributed to the incident. The HCJ had erroneously embarked on revisiting the issue of liability, when the said Court of Appeal order

ordered assessment of the various heads of damages, if any. In fact, the HCJ had further compounded the error of the Deputy Registrar by further probing into the issue of liability, through his consideration of purported unjust enrichment for the appellants. The HCJ had also taken into account an irrelevant consideration in assessing damages namely that the appellants were not evicted from their homes in FBK-I. This had nothing to do with their losses pertaining to the palm oil plantations. (paras 18, 21, 22 & 23)

(2) The more appropriate quantum of general damages would be the quantum computed by PW1, whose testimony and calculations ought to be given greater weight as his calculations and testimony were based on data and documentary evidence. He also had 33 years of experience with the Malaysian Palm Oil Board ('MPOB'), concentrating on palm oil agronomical research and was an independent expert and not related to the appellants in any way. PW1 estimated the gross profits obtained by the 23 appellants over the relevant period of 12 years and six months to be RM7,658,659.33, and subtracted from this figure, was the estimated production costs of RM1,757,251.46 after taking into consideration that the appellants carried out all plantation works by themselves over the same period of time. As such, PW1 had assessed the net loss of profit suffered by the appellants as amounting to RM5,901,407.87. He had justified all aspects of his calculations with reference to, *inter alia*, MPOB's own data and FBK's own reports. (paras 28-30)

(3) PW1's evidence on the quantum of general damages should be preferred over that of DW3, given his sound credentials and relevant experience pertaining to the subject matter, credible calculations and most importantly, the fact that he was an impartial witness. DW3's method and basis of calculation was based on a document prepared by him, and the contents of this particular document was never put to any of the appellants' witnesses, in particular PW1. The respondent's failure to put DW3's calculations as contained in exh. D42 to PW1 under cross-examination was tantamount to an acceptance of PW1's calculations, based on the rule in *Browne v. Dunn*. Thus, the appropriate amount of general damages to be awarded to the appellants was RM5,500,000. (paras 34, 39 & 40)

(4) As for the claim for aggravated and/or exemplary damages, there was no arbitrariness, oppressiveness or unconstitutional conduct on the part of the respondents nor did it disclose any fraud, malice, violence, cruelty, insolence or the like, on the part of the respondents or, the respondents acted in contumelious disregard of the appellants' rights. The conduct of the respondents did not justify the award of exemplary damages against them. Their negligence and the breach of their fiduciary

duties and perhaps also their very poor judgment and their indifference were not so wanton and in contumelious disregard of the appellants' rights. The appellants' claim for exemplary damages was disallowed. (paras 46 & 47)

(5) There had been a clear lack of appreciation of evidence and misdirection by the HCJ in coming to his decision. The HCJ also misdirected herself when finding that the actions of the appellants themselves had actually contributed to the events that took place in this case and that if damages were awarded, it was certain that the appellants would be unjustly enriched. Consequently, these errors and misdirection, warranted appellate intervention. There was thus merit in the appellants' appeal. (paras 48-50)

Case(s) referred to:

Bonham-Carter v. Hyde Park Hotel Ltd [1948] WN 89 ***(refd)***
Browne v. Dunn (1893) 6 R 67 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Guan Soon Tin Mining Company v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***
KFH Ijarah House (M) Sdn Bhd v. Aamir Nordin Ariffin [2010] 1 LNS 394 HC ***(refd)***
Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors And Another Appeal [2005] 3 CLJ 753 CA ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***
Rasidin Partorjo v. Frederick Kiai [1976] 1 LNS 123 FC ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt [2016] 9 CLJ 73 CA ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:

Land (Group Settlement Areas) Act 1960, ss. 10(1)(b), 12
National Land Code, s. 78(3)

For the appellants - Bastian Pius Vendargon, Abdul Haris Abdul Malik & Adrian Kumar Vendargon; M/s Abdul Haris & Co
For the respondents - Naziya Mohammad Nazri; Legal Advisor

[Editor's note: For the High Court judgment, please see Ghazali Mat & Yang Lain lwn. Pengarah Tanah Dan Galian Negeri Terengganu & Satu Lagi [2019] 1 LNS 2341 (overruled in part).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Lee Heng Cheong JCA:

Introduction

B **[1]** The 23 appellants in this appeal, were part of 164 young persons selected by the State Government of Terengganu to participate in the group settlement areas scheme under the Land (Group Settlement Areas) Act 1960 ('Act 530'), developed and managed by the Federal Land Consolidation and Rehabilitation Authority ("Felcra"). There were two schemes involved *ie*, Felcra Bukit Kapah I scheme ('FBK-I') and Felcra Bukit Kapah II scheme C ('FBK-II'). In 1978 and 1979, the appellants entered the FBK-I scheme to develop the land for the purpose of palm oil plantation. Each participant was given a total holding of ten acres as palm oil planting plot and a 1/2 an acre as residential plot. Each participant was also provided with costs of living which was regarded as loan payable to Felcra and when the palm oil D produced revenue, Felcra would deduct part of the income as: (i) advanced cost of living; and (ii) consolidated annual charges payable to the State Government of Terengganu *in lieu* of premium paid under the National Land Code ('NLC').

E **[2]** In 2002, when the palm oil trees were old and no longer economical to be maintained, Felcra proposed a replantation for the FBK-I scheme. In order to do so, in 2002 and 2003, the State Executive Council ('Exco') decided to grant the appellants, a site in FBK-II in place of FBK-I. A total of 32 participants, including the appellants refused to move out and to participate in the replantation scheme on the grounds that they did not want F to be continuously indebted with Felcra. The new State Government of Terengganu, formed after the 2004 election, on 24 April 2004, decided to revoke the Exco's decision for the resettlement to FBK-II scheme. Pursuant to the decision, the appellants were ordered to vacate their holdings in FBK-II scheme. Dissatisfied with the decision, the plaintiffs filed a claim in the G High Court. The High Court held that the appellants' claim was without merit and dismissed the same.

[3] Hence, the appellants appealed to the Court of Appeal *vide* Civil Appeal No. T-01(NCVC)(W)-287-08-2015. The Court of Appeal allowed the appellants' appeal in part with costs and held as follows.

H **[4]** Mohd Zawawi Salleh JCA (as he then was) delivering the judgment of the Court of Appeal granted *inter alia* the following orders which are as follows:

(i) there were two forms of relationship between the appellants as participants of the group scheme with Felcra under Act 530. Firstly, a I contractual relationship between the appellants and Felcra based on the agreement signed in 1978. Secondly, the relationship between the

appellants and Felcra/State Government in relation to the condition for possession of land in group settlement scheme in accordance with the provisions contained in the Act 530 and the NLC;

(ii) the lands for the FBK-I and FBK-II schemes were the Government's land and were gazetted as lands for the Federal Development Plan which will be managed by Felcra. In accordance with the provisions under Act 530 and the NLC, the Government's land could not be occupied unless the title or temporary occupation licence has been obtained. The concept of occupation in expectation of title under s. 12 of Act 530 means that the appellants were granted permission to occupy the Government's land which was gazetted for Federal Development Plan until the titles are issued, pursuant to s. 10(1)(b) of Act 530;

(iii) however, according to s. 78(3) of the NLC, the appellants had no rights whatsoever in the lands pending their registration in the appellants' names. Although the approval for alienation was granted by the Exco, the lands remained in the State Government's ownership and the Exco had implied authority to revoke the earlier decision. The Exco and/or the respondents were not under an obligation to grant the appellants, the opportunity to make representation or given right to be heard before the Exco decided to revoke the earlier decision. Therefore, the submission that the Exco's decision on 24 April 2004 was unreasonable and was made arbitrarily, was without merit as the decision involved social, economic and political policy. The Exco maintained the *status quo* of the FBK-II scheme and the appellants were provided with settlement in the FBK-I scheme;

(iv) when the Exco decided to revoke the appellants' settlement in FBK-II scheme, the Exco had decided that the appellants be granted a resettlement in FBK-I. The decision was never cancelled and remained the State Government's decision and policy. In fact, the appellants agreed to release the lands in FBK-I scheme without any claims as they had been promised with land titles in FBK-II scheme;

(v) when Felcra wanted the appellants to replant the palm oil trees, the agreement between the appellants and Felcra signed in 1978, which was enforceable for 15 years, had lapsed. There was no evidence adduced to show that a new agreement had been signed where the appellants agreed for the replantation of palm oil trees with Felcra's assistance. In fact, the appellants opted for the replantation of palm oil trees on their own expenses. Therefore, the appellants were entitled to the alternative relief, *ie*, the title under the FBK-I scheme with all costs for survey and the subdivision of lots to be payable in full by the respondents;

(vi) the appellants were declared to be entitled to the land titles of 1/4 acre each as residential area regardless of whether the land was being or had been occupied by the appellants. Therefore, the respondents were ordered to take follow-up steps within reasonable period to enforce the issuance of titles to the appellants for the FBK-I scheme and the titles for the 1/4 acre provided as residential plots; and

(vii) general damages, "special damages" and "aggravated and exemplary damages", if any, will be assessed by the Deputy Registrar/Senior Assistant Registrar.

Terengganu High Court

[5] Pursuant to this Court of Appeal's Order dated 12 January 2017, there was an assessment hearing before the Deputy Registrar of the Terengganu High Court to determine the quantum of damages if any, that the appellants were entitled to. The learned Deputy Registrar declined to award the appellants any damages whatsoever and awarded costs of RM4,000 to the respondents.

[6] Dissatisfied, the appellants appealed against this decision to the High Court. The learned High Court Judge dismissed the appellants' appeal and affirmed the decision of the learned Deputy Registrar.

[7] The appellants have filed this appeal before this court against the decision of the learned High Court Judge in respect of the quantum of damages only.

[8] This is an unanimous decision of the court. We heard this appeal on 15 February 2022 and these are the broad grounds for our decision.

[9] The parties herein shall be referred to, in their respective capacities before this court.

The Findings Of The Learned High Court Judge

[10] The learned High Court Judge found and held *inter alia* as follows:

(i) that the calculations made PW1, Mr. Hasnol bin Othman, a Senior Research Officer at Malaysia Palm Oil Board ("MPOB"), is inaccurate, unreasonable and excessive because PW1 only referred to data from MPOB alone and did not make any site visits, as well as just referring to the entire FBK plan alone;

(ii) that the respondent's witness, DW3, Mr. Mohamad bin Ismail working in Felcra Eastern Region has made a more appropriate and reasonable calculation proposal;

(iii) that the actions of the appellants themselves have actually contributed to the events that took place in this case;

(iv) that the Court of Appeal Order dated 12 January 2017, ordering alternative relief that the plaintiffs be given title under FBK-I and each person's land tenure was sufficient and fair because the words in the above Court of Appeal Order (prayer G) were "Compensation if any will be assessed";

(v) that no real loss was experienced because based on the appellants' own evidence during the transfer to FBK-II, there was no change of ownership and no eviction took place;

(vi) that there is no solid evidence that the appellants were barred from entering the estate even though there was a closed gate. The respondents' witnesses stated that the gate was for security purposes to prevent theft;

(vii) that the appellants themselves were afraid to enter the farm as they thought they had lost their status as FBK-I settlers but strangely some of them undertook replanting in FBK-I during that period even though they stated there were barriers to entry; and

(viii) that if this general compensation is awarded, it is certain that the appellants would be unjustly enriched because the appellants themselves contributed to the incident.

The Appellants' Contentions

[11] Before us, the appellants contended *inter alia* as follows:

(i) that the learned High Court Judge has adopted the main error by the learned Deputy Registrar, in that his decision to dismiss the appellants' appeal and affirm that they were entitled to no damages whatsoever was primarily predicated on the erroneous finding of contributory negligence on their part;

(ii) that the learned High Court Judge compounded the error of the learned Deputy Registrar by further delving into the issue of liability, through his consideration of purported unjust enrichment for the appellants.

(iii) that the learned High Court Judge, in deciding not to grant damages, acted in excess of jurisdiction and focused on a plainly wrong approach of reopening the issue of liability, and that this, in itself, should be sufficient grounds for this appeal to be allowed; and

(iv) that learned High Court Judge has taken into account an irrelevant consideration in assessing damages namely, that the appellants were not evicted from their homes in FBK-I. This has nothing to do with their losses pertaining to the appellants' losses.

A **The First And Second Respondents' Contentions**

[12] The respondents *inter alia* contended as follows:

(i) that PW1's data is from MPOB and is only for FELCRA's Region East area while the costs of production are only based on his experience
B without actual reference to the site or from the proper records of FELCRA, FBK or MPOB;

(ii) that PW1 also admitted that he did not check on the actual income of the actual FELCRA participants and acknowledges the calculation of the estimated income of the appellants is based on averages of the income;

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(iii) that PW1 further admitted that the appellants were reluctant to join the replanting scheme and if replanting is applicable, the yield can only be harvested in two and half years' to three years' time. This fact was not considered in the rough calculation of the estimated income. Further, the age of the oil palm in the FBK-1 have already exceeded 20 years and
D have to be taken into account; and

(iv) that if the appellants were awarded damages, they would be unjustly enriched.

Our Analysis And Decision

E **[13]** We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

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> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

[14] In the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, the Federal Court held that:
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> [12] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention *ie*, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly
H entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting
I or rejecting the whole or any part of the evidence placed before him.

The Court of Appeal further reiterated the principle central to appellate intervention *ie*, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[15] In the Federal Court case of *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, Zabariah Mohd Yusof FCJ delivering the judgment of the court, held *inter alia* as follows:

(1) *An appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acts on the printed records.* In the UK, the test adopted by the appellate courts is not whether the higher courts feels that it would have reached a different conclusion on the same fact as the trial court, but *whether or not the decision by the lower court on findings of fact was reasonable. If the trial judge's decision can be reasonably explained and justified, then the appellate courts should refrain from intervention.* (paras 33, 34 & 60)

(2) *The court in Henderson separated the four non-exhaustive identifiable errors of a trial judge from the plainly wrong test: (i) a material error of law; (ii) a critical finding of fact which has no basis in the evidence; (iii) demonstrable misunderstanding of relevant evidence; and (iv) a demonstrable failure to consider relevant evidence. The phrase 'lack of judicial appreciation of evidence' used in Gan Yook Chin & Anor v. Lee Ing Chin & Ors could very well encompass three out of four errors of a trial judge identifiable in Henderson. Whilst there was a slight difference in the approach of the appellate intervention, both the UK Supreme Court and the Federal Court effectively shared a common thread where it had been held that appellate intervention was justified where there is lack of judicial appreciation of evidence. What is pertinent is that the 'plainly wrong' test is not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts.* (paras 54, 72, 74 & 76)

(3) *An appellate court should not interfere with the factual findings of a trial judge unless it was satisfied that the decision of the trial judge was 'plainly wrong' where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. …*

(4) … (9) …

(10) *Henderson* was not setting any guidelines to the plainly wrong test. It merely provided a construction as to what amounts to the 'plainly wrong' test in an appellate intervention. Rather than adopting a rigid set of rules to demarcate the boundaries of appellate intervention insofar as findings of fact are concerned, the 'plainly wrong' test should be retained as a flexible guide for appellate courts. … (emphasis added)

[16] I also found instructive the Federal Court case of *Rasidin Partorjo v. Frederick Kiai* [1976] 1 LNS 123, [1976] 2 MLJ 214, where it was stated by Wan Suleiman FCJ in the following passage:

A The principle upon which an appellate court will interfere with an award of damages made by a judge sitting alone has been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at pp. 616 to 617 as follows:

> Where the award is that of the judge alone, the appeal is by way
B of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases,
C but a good general guide is given by Greer LJ in *Flint v. Lovell*. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference.
D The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[17] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellant's appeal.

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[18] The matter of liability in the present appeal had already been settled by the Court of Appeal Order dated 12 January 2017. The respondents were found liable and there was no finding of contributory negligence on the part of the appellants. Nor was a finding that if general compensation is awarded, the appellants would be unjustly enriched because the appellant themselves
F contributed to the incident.

[19] It is settled principle of law that when one brings an action before the court for damages, one must prove it. However, before one can recover the damages, one has to discharge the burden of proving both as to the fact of
G the loss/damage and as to the amount, see: (i) *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99; and (ii) *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] WN 89.

[20] It is trite that a claimant must, during an assessment of damages hearing, prove the losses he has suffered, and not merely "throw the
H particulars of loss at the head of the court". This was restated by the Federal Court in the case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777 where Edgar Joseph Jr FCJ cited the following passage with approval:

> And, in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd*
I [1989] 2 MLRH 705; [1989] 3 MLJ 360; [1990] 2 CLJ 635, the Court had occasion to say this (at p. 367):

> **It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover.** If he proves neither, the action will fail, or he may be awarded only nominal damages upon proof of the contravention of a right. Thus, nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently or at all, the Court will usually decree nominal damages. (emphasis added)

[21] From our perusal and examination of the records of appeal, the facts and circumstances of this case, we are of the considered view that the learned High Court Judge, erroneously embarked on revisiting the issue of liability, when the said Court of Appeal Order dated 12 January 2017, ordered assessment of the various heads of damages if any.

[22] In fact, the learned High Court Judge further compounded the error of the learned Deputy Registrar, by further probing into the issue of liability, through his consideration of purported unjust enrichment for the appellants.

[23] In para. 11 of his grounds of judgment, we are of the view that the learned High Court Judge took into account, an irrelevant consideration in assessing damages namely, that the appellants were not evicted from their homes in FBK-I. This has nothing to do with their losses pertaining to the palm oil plantations.

General Damages

[24] As to the issue of quantum of general damages sought, the appellants and respondents each, called a witness to give opinion evidence during the assessment hearing before the learned Deputy Registrar.

[25] The appellants relied on the expert evidence of PW1, whilst the respondents called DW3.

[26] We noted that the learned High Court Judge, at para. 7 of his grounds of judgment accepted DW3's calculation of general damages suffered by the appellants as being "appropriate and reasonable". DW3 calculated general damages for nett loss of income to be RM872,242.78. (See also: DW3's table of calculations, which appears as an annexure to his witness statement and marked as exh. D42).

[27] In the light of the learned High Court Judge's finding that DW3's calculation of general damages for nett loss of income of RM872,242.78 was "appropriate and reasonable", then the learned High Court Judge ought to have awarded that sum of RM872,242.78 to the appellants instead of making no award for damages and dismissing the appellants' claim with costs.

[28] We are in agreement with the appellant's contention that the more appropriate quantum of general damages would be the quantum computed by PW1. PW1's testimony and calculations ought to be given greater weight as his calculations and testimony are more convincing and based on data and documentary evidences. Further PW1 has over 33 years of experience with MPOB, concentrating on palm oil agronomical research along with providing advice to small-scale oil palm planters. Further, he is an independent expert and is not to related to the appellants in any way. PW1's educational background is that he graduated with a Diploma in Agriculture from University Pertanian in 1984 and Bachelor of Science in Agriculture from University Sains Malaysia in 1997. PW1 has been with MPOB since 1984 as Assistant Officer Researcher and in 1997, he was promoted to an Officer Oil Palm Plant Research and also his duty was to give farming advice to estates and small holders.

[29] Based on his expertise and experience, PW1 estimated the gross profits obtained by the 23 appellants over the relevant period of 12 years and 6 months to be RM7,658,659.33, and subtracted from this figure, is the estimated production costs of RM1,757,251.46 after taking into consideration that the appellants carried out all plantation works by themselves over the same period of time. As such, PW1 has assessed the nett loss of profit suffered by the appellants as amounting to RM5,901,407.87.

[30] From the testimony of PW1 and the documentary evidences referred to, we are of the considered view that he had justified all aspects of his calculations with reference to, *inter alia,* MPOB's own data and FBK's own reports.

[31] DW3's evidence-in-chief on the other hand, was principally focused on attacking PW1's calculations as being "extremely unreasonable". He sought to discredit PW1's calculations by claiming that they were based on "data on paper" only ("data diatas kertas sahaja") and that PW1 failed into account the pertinent factors on the ground pertaining to palm oil planting. Ironically, however, he then proceeded to make his calculations based on documentary records of his own from FBK-I.

[32] We find that the core problem with DW3's calculations is that his figure for the gross profits obtained was based on an unfathomable decision to divide 1197.46 hectares of plantation land by four individual appellants, which he confirmed under cross-examination. This is clearly without any basis or relevance. We are of the considered view that such a division is superfluous and erroneous since each appellant was individually awarded 4.05 hectares (ten acres) of plantation land, and this figure was used as the basis of the appellant's expert witness' (PW1's) calculation.

[33] In so far as the respondents' witness, DW3 Mr. Mohamad bin Ismail who was working in Felcra Eastern Region is concerned, we are of the considered opinion that he is merely a Marketing Manager employed by a FELCRA-linked company, Felcra Wilayah Timur Berhad, with approximately half the experience of PW3. Further, his expertise is strictly not relevant as he is the marketing field and is not an independent, impartial expert.

[34] In the premises, we are of the considered view that PW1's evidence on the quantum of general damages should be preferred over that of DW3, given his sound credentials and relevant experience pertaining to the subject-matter, credible calculations and most importantly, the fact that he is an impartial witness in this present case. We also find that PW1 have properly explained the basis of calculations for the general damages suffered by the appellants well by reference to various documents and data.

[35] Most importantly, we are of the considered opinion that DW3's method and basis of calculation, was based on a document prepared by him, namely exh. D42 which is the "Anggaran Pendapatan Setiap Plantis Berdasarkan Hasil Per Hektar" and the contents of this particular document was never put to any of the appellants' witnesses, in particular PW1 when PW1 testified. It is noted that the marking of the said document as an exhibit was objected to, by the appellant's counsel at the material time.

[36] In the light of the respondent's failure and/or omission to put the contents of exh. D42 which formed the respondents' essential and material case to PW1 or any of the appellant's witnesses, we are of the considered view that the respondents have accepted PW1's testimony in its entirety.

[37] We refer to the case of *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt* [2016] 9 CLJ 73; [2016] 5 MLJ 220 where Hamid Sultan Abu Backer JCA stated as follows:

> *The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice ... if he asks no question with regard to this, then he must be taken to accept the plaintiffs' account in its entirety.* Such failure leads to miscarriage of justice, ... (emphasis added)

[38] The well-established rule in *Browne v. Dunn* (1893) 6 R 67 on failure to put one's case has been accepted in Malaysia in a number of cases. In *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt (supra)*, the Court of Appeal reaffirmed this principle, Hamid Sultan Abu Backer JCA citing the following passage with approval:

> *... It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross examination. A failure in this respect may be treated as an abandonment of the pleaded case ...*

A The law is clear on the subject. *Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination. it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice ... if he asks no question with regard to this, then he must be taken to accept the plaintiffs' account in its entirety.* Such failure leads to miscarriage of justice, first by springing surprise upon the party when
B he finished the evidence of his witness and when he has no further chance to meet the new case made which was never put and secondly, because subsequent testimony has no chance to be tested and corroborated.

The words echoed by the Court of Appeal have its roots in *Sarkar on*
C *Evidence*, 14th edn, p. 2006, which reads as follows: *Small Medium Enterprise Development Bank Malaysia v. Lim Woon Katt* [2017] 1 MLRA 215. Effect of omitting or not cross-examining a witness on essential points. The skillful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, *he should interrogate the witness on all material points that go against him. If he omits or ignores them, they may be taken*
D *as an acceptance of the truth of that part of witness's evidence ...*

(emphasis added)

[39] Thus, we are of the view that the respondents' failure to put DW3's calculations as contained exh. D42 to PW1 under cross-examination is tantamount to an acceptance of PW1's calculations, based on the rule in
E *Browne v. Dunn (supra).*

[40] As such, and after taking into consideration all the relevant circumstances and evidence, we are of the considered view that the appropriate quantum of general damages to be awarded to the appellants, is RM5,500,000.

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Aggravated And/Or Exemplary Damages

[41] In this appeal, the appellants are also seeking for aggravated and/or exemplary damages. Exemplary damages, therefore, are not compensatory in nature, but contumelious and reprehensible conduct, in disregard of the
G claimant's rights. It also acts as a deterrent to others who are contemplating conduct of a similar nature.

[42] In *Khaw Cheng Poon & Ors v. Khaw Cheng Bok & Ors And Another Appeal* [2005] 3 CLJ 753; [2005] 6 MLJ 540, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal said:

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> ... **Exemplary damages are only awarded in special circumstances**. These circumstances are contained in the speech of Lord Devlin to which we have already referred, that no new categories are admissible to the Devlin list has now been settled in the decision of the House of Lords in *Cassell & Co Ltd v. Broome* [1972] AC 1027. (emphasis added)

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[43] Lord Devlin in the celebrated case of *Rookes v. Barnard* [1964] AC 1129, stated that aggravated damages unlike ordinary damages whose purpose is to compensate and that of exemplary damages is to punish and deter, and there are two categories of cases when it should be awarded, *viz*: A

(i) oppressive, arbitrary or unconstitutional action by the servants of Government; B

(ii) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

[44] From its very nature, aggravated damages were to compensate the victim for the unacceptable behaviour of the wrongdoer. The victim should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the victim and, at the same time, the sheer abhorrence against the negligent conduct of the wrongdoer. C

[45] In *KFH Ijarah House (M) Sdn Bhd v. Aamir Nordin Ariffin* [2010] 1 LNS 394; [2010] MLJU 450, Balia Yusof Wahi J (as he then was) held *inter alia* as follows: D

> ... It is trite that exemplary or punitive damages are meant to serve a different purpose from compensatory damages. Exemplary damages has always been used by the courts to punish the wrongdoer for reprehensible conduct, to deter not only the wrongdoer but others of like mind in the community from similar conduct; to ameliorate the victim's sense of grievance and thereby to abate the urge for self help or violent retribution, to the danger of the public peace (See: *Uren v. John Fait1ax & Sons Pty. Ltd* (1966) 117 CLR 118 at page 149 per Windeyer J). *It is awarded when the defendant's conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where the defendant acts in contumelious disregard or the plaintiff's rights* (*Mayne & Mc Gregor on Damages* 12th Ed. (1961) Pg. 196). (See also: *Laksamana Realty Sdn. Bhd v. Goh Eng Hwa* [2005] 4 CLJ 87, *Foong Chee Chong v. Inspector Mohd Nasir b. Shamsuddin* [1998] 6 MLJ 421, *Yip Shau Shan v. Sin Heap Lee-Marubeni Sdn. Bhd.* [2002] 5 MLJ 113). E F G
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> *Exemplary damages if allowed, in order to serve its purpose must not merely irritate, it must sting. It is the gravity and character of the defendant's conduct which guides the court's discretion as to the proper amount to award by way of exemplary damages.*
>
> Having regard to the facts and circumstances of the matter before me now, *it is my considered view that the conduct of the defendant here does not justify the award of exemplary damages against him. In my view his negligence and the breach of his fiduciary duties and perhaps also his very poor judgment, his indifference and his acting in conflict of interest with his position as an employee of the plaintiff were not so wanton and in contumelious disregard of the plaintiff's rights.* For the aforesaid reasons, the plaintiff's claim for exemplary damages is disallowed. (emphasis added) H I

[46] Having perused the records of appeal and the facts and circumstances of this case, we are of the considered view that there was no arbitrariness, oppressiveness or unconstitutional conduct on the part of the respondents nor does it disclose any fraud, malice, violence, cruelty, insolence or the like, on the part of the respondents or, the respondents acted in contumelious disregard of the appellants' rights.

[47] We are of the considered opinion that the conduct of the respondents does not justify the award of exemplary damages against them. In our view, their negligence and the breach of their fiduciary duties and perhaps also their very poor judgment and their indifference were not so wanton and in contumelious disregard of the appellants' rights. For the aforesaid reasons, the appellants' claim for exemplary damages is disallowed.

Conclusion

[48] Based on the reasons enumerated above, we find that there has been a clear lack of appreciation of evidence and misdirection by the learned High Court Judge in coming to his decision that warrants our intervention. The learned High Court Judge also misdirected herself when he found that the actions of the appellants themselves have actually contributed to the events that took place in this case and that if damages are awarded, it is certain that the appellants would be unjustly enriched. Consequently, these errors and misdirection, warranted appellate intervention on our part.

[49] In reaching our conclusion, we were very much guided by the principles on appellate intervention as recently pronounced by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of The Estates of Tan Ewe Kwang, Deceased & Ors (Supra).* In our view, the learned High Court Judge's decision was in our view, plainly wrong.

[50] In the light of our above findings, we are of the respectful view that there are merits in the appellants appeal and we unanimously allow the appellants appeal in part with costs. In the premises, we award general damages for loss of opportunity costs in the sum of RM5,500,000 and the appellants claim for exemplary and aggravated damages are dismissed. We further award costs of RM30,000 subject to allocator, being costs here and below, to the appellants.

[51] The decision and order of the High Court Judge dated 12 September 2019 is varied accordingly.